United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-2604

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United States Court of Appeals

FOR THE SECOND CIRCUIT

CLEARVIEW CONCRETE PIPE CORP., d/b/a CLEARVIEW CONCRETE PRODUCTS CORP., and GRAND PRE-STRESSED CORP.,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD AFFIRMING A DECISION AND ORDER OF AN ADMINISTRATIVE LAW JUDGE.

REPLY BRIEF OF PETITIONERS, CLEARVIEW CONCRETE PIPE CORP., d/b/a CLEARVIEW CONCRETE PRODUCTS CORP., AND GRAND PRE-STRESSED CORP.

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Viewed in its entirety, the respondent's brief presents what is tantamount to an admission that respondent failed to sustain its burden of proof to show that petitioners engaged in unfair labor practices in terminating the six employees of the maintenance department.

Respondent's brief states, at page 10, that "The sole question to be determined with respect to the discharges is whether substantial evidence on the record as a whole supports the Board's findings that they were motivated by the Company's desire 'to bar (the maintenance employee's) quest for representation by the Machinists and to prevent such attempts in the future' . . ., or whether they resulted from valid economic considerations, as the Company contends." Having thus stated the "sole question", which is

actually two questions, respondent was faced with the clear dilemma that in order to try to affirmatively answer the first question it would have to, and understandably did, totally ignore the uncontroverted evidence in the record concerning the second.

The salient facts that stand out from the testimony of each and every witness who testified, is that the bogie project was a project entered into by the petitioners shortly after the opening of business of Grand Pre-Stressed which involved a completely new and different kind of work, namely, heavy fabrication and welding work to, in effect, rebuild the war surplus trailers for the specific purpose of transporting the large pre-stressed concrete members being manufactured by Grand Pre-Stressed; that it was not the regular kind of work normally done by either of the petitioners; that four of the six maintenance department employees were hired after Grand Pre-Stressed commenced its operations in 1971; that the bogie project occupied either a considerable portion of the time or most of the time, of all six maintenance department employees; and that upon completion of the bogie project there was no further need to retain a maintenance department of six employees.

Indeed, the evidence is clear and substantial that the six maintenance department employees knew that upon completion of the bogie project they would be faced with the probability of lay-offs.*

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* For example, the testimony of Mr. DiSomma (E.T. 145):

"Q. When was the first time that the subject of unions came up?

A. Around July 6th, Mr. Leonardi, that is Louis, came to George and I and he handed us a couple of cards saying would we fill these cards out for Local 447 and we would be protected *and nobody would be laid off*, plus we would be covered by a union. That is what Mr. Leonardi said to me." (Emphasis supplied.)

Petitioners have never denied that the six maintenance department employees engaged in union activities, nor have they ever maintained that such activities were improper. What petitioners do maintain, and it is submitted that the evidence pertaining thereto is absolutely clear and convincing, is that the very timing of the union activity engaged in by the six maintenance department employees at the very least raises a clear question, concerning which respondent has produced absolutely no contradictory evidence, that the union activity engaged in was merely a device to be used by the six maintenance department employees in the event that they were subsequently laid-off. Indeed, it is most significant that the Machinists' union only notified the Company of its request to bargain on July 20, approximately one week before the bogie project was completed and the first two of the six lay-offs occurred. Even more significant is the fact that the union subsequently withdrew its bargaining request. If respondent had any evidence of any kind to explain away these uncontroverted facts, it had a duty to produce it. The unrefuted evidence in the record shows that the lay-offs were predominently motivated by economic considerations rather than union activity.

The respondent's evidence that the petitioners violated the act in laying off the six maintenance department employees, is totally insubstantial and clearly does not preponderate. Moreover, testimony by respondent's own witnesses bearing directly upon their previously stated reasons for the lay-offs was improperly excluded by the Administrative Law Judge.*

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* The respondent's brief states (fn. 16, p. 19) that "The Company now argues for the first time that the Administrative Law Judge committed prejudicial error by refusing to permit Company counsel to question employees". Thus, respondent conveniently overlooks the fact that this point was raised to the Board by petitioners in their exceptions to the Decision and Order of the Administrative Law Judge (A. 41).

It is respectfully submitted that the Order of the Board dated November 7, 1974, affirming the Decision and Order of the Administrative Law Judge dated June 14, 1974, should be set aside in its entirety.

Respectfully submitted,

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Of Counsel,
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IT IS HEREBY CERTIFIED that a true copy of the annexed reply brief of petitioners was mailed to the National Labor Relations Board, Office of the General Counsel, Attention Elliott Moore, Esq., and Michael J. Messitte, Esq., Washington, D. C.20570, the 14th Day of May, 1975.

HYNES & DIAMOND

By: Ralph C. Kreimer

Ralph C. Kreimer